

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:B04 – PLR-136627-09

Date: December 16, 2009

Legend:

Father =

Mother =

Residence =

Child 1 =

Child 2 =

Child 3 =

Trust 1 =

Trust 2 =

Date 1 =

Date 3 =

Date 2 =

Year 1 =

Modification 1 =

Modification 2 =

Amendment and
Restatement 1

Amendment and
Restatement 2

z =

Dear _____ :

This responds to your June 1, 2009 letter and other correspondence requesting a ruling under § 2702 of the Internal Revenue Code with respect to the proposed amendment and restatement of two trusts.

The facts submitted are as follows:

Prior to Date 1, Father and Mother each owned an undivided one-half interest in Residence outright. On Date 1, Father deeded his interest in Residence to Trust 1, and Mother deeded her interest in Residence to Trust 2. Trust 1 provides that Father would retain a term interest to possess and occupy Residence until the earlier of Father's death or Date 3. Trust 2 provides that Mother would retain a term interest to possess and occupy Residence until the earlier of Mother's death or Date 3.

Article I, Section C of Trust 1 provides, in relevant part, that upon the expiration of the term due to Father's death before Date 3, Trust 1 is to terminate and be distributed to another trust created by Father. Article I, Section D of Trust 1 provides, in relevant part, that upon expiration of the term on Date 3, if Father is still living, Trust 1 is to continue for the benefit of Father's then surviving children, or the children of a deceased child. Thereafter, on the later to occur of the death of Mother or Father, Trust 1 is to terminate and be distributed to Father's then surviving issue per stirpes. Article I, Section C of Trust 2 provides, in relevant part, that upon the expiration of the term due to Mother's death before Date 3, Trust 2 is to terminate and be distributed to another trust created by Mother. Article I, Section D of Trust 2 provides, in relevant part, that upon expiration of the term on Date 3, if Mother is still living, Trust 2 is to continue for the benefit of Mother's then surviving children, or the children of a deceased child. Thereafter, on the later to occur of the death of Mother or Father, Trust 2 is to terminate and be distributed to Mother's then surviving issue per stirpes.

Father and Mother serve as co-trustees of Trust 1 and Trust 2. Trust 1 and Trust 2 were intended to qualify as qualified personal residence trusts (QPRTs) as described in § 25.2702-5(c). Father and Mother each reported the transfer of his or her interest in Residence to Trust 1 or Trust 2, respectively, on a Form 709, United States Gift (and Generation-Skipping Transfer) Tax return, for Year 1.

Father and Mother have three children, Child 1, Child 2, and Child 3. Children 1-3 are all adults.

On Date 2, Father and Mother, in their capacities as co-trustees of Trust 1, with the joinder and consent of Children 1-3, executed Modification 1 to modify Trust 1.

Modification 1 is effective on Date 3. Modification provides that upon expiration of the term on Date 3, Children 1-3 are each granted the power to appoint an equal share of the corpus of the Trust 1 estate to themselves, or by unanimous agreement, they may direct the trustee to amend and restate the terms of Trust 1 so as to provide a term interest to Father, Father's spouse, or both, as a gift by Father's children. On Date 2, Father and Mother, in their capacities as co-trustees of Trust 2, with the joinder and consent of Children 1-3, executed Modification 2 to modify Trust 2. Modification 2 is effective on Date 3. Modification provides that upon expiration of the term on Date 3, Children 1-3 are each granted the power to appoint an equal share of the corpus of the Trust 1 estate to themselves, or by unanimous agreement, they may direct the trustee to amend and restate the terms of Trust 2 so as to provide a term interest to Mother, Mother's spouse, or both, as a gift by Mother's children.

Children 1-3 intend to direct the trustee to amend and restate Trust 1 (Amendment and Restatement 1) to grant a z year term interest to Father to possess and occupy Residence on Date 3. Children 1-3 intend to amend and restate Trust 2 (Amendment and Restatement 2) to grant a z year term interest to Mother to possess and occupy Residence on Date 3. Article V of each amendment and restatement provides, in relevant part, that upon the death of the respective term holder during the z year term, if the term interest holder's spouse survives the term interest holder, the remaining portion of the term holder's term interest will pass to the surviving spouse. If the term holder's spouse does not survive the term interest holder, the trust estate will be distributed to Children 1-3. Upon expiration of the term and unless the Children agree to an extension, the term interest will expire, and the trust estate will be distributed to Children 1-3.

You have requested the following rulings:

1. Sections 2702(a)(1) and 2702(a)(2) will not apply to proposed Amendment and Restatements 1 and 2.
2. Upon executing Amendment and Restatements 1 and 2, Children 1-3 will make a transfer of property by gift within the meaning of § 2501 to Father and to Mother, respectively.

LAW AND ANALYSIS

Section 2501(a) provides that a tax is imposed for each calendar year on the transfer of property by gift during such calendar year.

Section 2511(a) provides that the gift tax applies whether the transfer is in trust or otherwise, whether the gift is direct or indirect and whether the property is real or personal, tangible or intangible.

Section 2514(b) provides that the exercise or release of a general power of appointment shall be deemed the transfer of property by the individual possessing the power.

Section 2514(c) provides that the term “general power of appointment” means a power which is exercisable in favor of the individual possessing the power, his estate, his creditors, or creditors of his estate.

Section 2702(a)(1) provides that, solely for purposes of determining whether a transfer of an interest in trust to (or for the benefit of) a member of the transferor's family is a gift (and the value of such transfer), the value of any interest in such trust retained by the transferor or any applicable family member (as defined in § 2701(e)(2)) shall be determined as provided in § 2702(a)(2).

Section 2702(a)(2) provides that the value of any retained interest that is not a qualified interest is treated as being zero. The value of any retained interest that is a qualified interest is determined under § 7520.

Section 2702(a)(3)(A)(ii) provides that § 2702(a) shall not apply to any transfer if such transfer involves the transfer of an interest in trust all the property in which consists of a residence to be used as a personal residence by persons holding term interests in such trust.

Section 25.2702-5(a)(1) of the Gift Tax Regulations provides, in part, that § 2702 does not apply to a transfer in trust meeting the requirements of that section. A transfer in trust meets the requirements of the section only if the trust is a personal residence trust (as defined in § 25.2702-5(b)). A trust meeting the requirements of a qualified personal residence trust (as defined in § 25.2702-5(c)) is treated as a personal residence trust.

Section 25.2702-5(c)(1) provides that for purposes of § 2702(a)(3)(A)(ii), a qualified personal residence trust is a trust meeting all the requirements of the section. These requirements must be met by provisions in the governing instrument, and these governing instrument provisions must by their terms continue in effect during the existence of any term interest in the trust.

Section 25.2702-5(c)(5) provides that, in general, except as otherwise provided in § 25.2702-5(c)(5)(ii) and § 25.2702-5(c)(8), the governing instrument of a qualified personal residence trust must prohibit the trust from holding, for the entire term of the trust, any asset other than one residence to be used or held for use (within the meaning of § 25.2702-5(c)(7)(i)) as a personal residence of the term holder. Under § 25.2702-5(c)(5)(ii), the trust may hold certain assets listed in that section in addition to

the personal residence.

Section 25.2702-5(c)(2)(i) provides that a personal residence of a term holder is either the principal residence of the term holder (within the meaning of § 1034); one other residence of the term holder (within the meaning of § 280A(d)(1) but without regard to § 280A(d)(2)); or an undivided fractional interest in either.

Section 25.2702-5(c)(2)(ii) provides that a personal residence may include appurtenant structures used by the term holder for residential purposes and adjacent land not in excess of that which is reasonably appropriate for residential purposes (taking into account the residence's size and location).

Section 25.2702-5(c)(2)(iii) provides that a residence is a personal residence only if its primary use is as a residence of the term holder when occupied by the term holder. A residence is not used primarily as a residence if it is used to provide transient lodging and substantial services are provided in connection with the provision of lodging (e.g., a hotel or a bed and breakfast). A residence is not a personal residence if, during any period not occupied by the term holder, its primary use is other than as a residence.

Section 4.01(52) of Rev. Proc. 2008-3, 2008-1 I.R.B. 110, 118, provides that rulings will not ordinarily be issued on whether a trust with one term holder satisfies the requirements of § 2702(a)(3)(A) and § 25.2702-5(c) to be a QPRT. Rev. Proc. 2003-42, 2003-1 C.B. 993, provides sample trust provisions for QPRTs. The Service will recognize a trust as meeting all of the requirements of § 2702(a)(3)(A) and § 25.2702-5(c) if the trust instrument is substantially similar to the sample in section 4 of Rev. Proc. 2003-42 and the trust operates in a manner consistent with the terms of the trust instrument and is a valid trust under applicable local law.

Accordingly, based on the facts submitted and the representations made, we conclude that §§ 2702(a)(1) and 2702(a)(2) will not apply to the proposed Amendment and Restatements 1 and 2, as long as these Amendment and Restatements 1 and 2, pursuant to which a term interest in Residence will be transferred from Children 1-3 to Father and to Mother, respectively, are substantially similar to the sample in section 4 of Rev. Proc. 2003-42 and the amended and restated trusts operate in a manner consistent with the terms of the trust instruments and are valid trusts under applicable local law, and if Residence qualifies as a personal residence as defined in § 25.2702-5(c)(2). We also conclude that, upon executing Amendment and Restatement 1, Children 1-3 will be transferring a term interest in Residence to Father by gift within the meaning of § 2501; and upon executing Amendment and Restatement 2, Children 1-3 will be transferring a term interest in Residence to Mother by gift within the meaning of § 2501.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, no opinion is expressed or implied concerning whether the transfer of a term interest in Residence to Father and the transfer of a term interest in Residence to Mother, pursuant to Amendment and Restatements 1 and 2, would result in the value of Trust 1 being included in the gross estate of Father and in the value of Trust 2 being included in the gross estate of Mother under § 2036.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of provides that it may not be used or cited as precedent.

Sincerely,

Lorraine E. Gardner
Senior Counsel, Branch 4
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosure:

Copy of letter for section 6110 purposes